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Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

◊

In re: D.W.G.K. RESTAURANTS, INC., dba JIMMY'S FAMILY OF FINE RESTAURANTS, et al.

Debtor.

ROBERT L. RENTTO,
Appellant,

v.

HOWARD JUSTUS,
Appellee.

◊

Petition For Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

◊

PETITION FOR WRIT OF CERTIORARI

◊

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QUESTIONS PRESENTED

1. Voluntary bankruptcies were filed by three partners. The bankruptcy court found a non-debtor corporation and prior partnerships owned by those three partners and a fourth non-debtor partner to be a partnership and ordered the assets of the non-debtor partnership, the predecessor partnerships and the non-debtor partner turned over to the bankruptcy estate. Since no voluntary petition was filed by or with consent of all of the general partners, did the bankruptcy court lack jurisdiction over the non-debtors or was jurisdiction of the bankruptcy court preserved by deeming this "de facto an involuntary petition" under In re Memphis-Friday's Associates, 88 B.R. 821, 827 (Bkcy. WD Tenn. 1988) and In re SWG Associates, 199 B.R. 557, 560-561 (Bkcy. W.D. PA 1996)?

2. Does due process require that the non-debtor partner and non-debtor partnerships taken into bankruptcy be

given the procedural protections of an involuntary case? In particular, are the defense costs and other debts incurred by the non-debtors during the time gap between the commencing of that litigation and entry of the order taking them or their assets into bankruptcy involuntarily entitled to the priority of involuntary gap claims?

3. Can a disgruntled partner avoid these jurisdiction and due process protections by naming the pleading by which he attempts to bring the partnership and the non-consenting partners or all of their assets into bankruptcy a "complaint" rather than an "involuntary petition?"

4. Does the conduct of Judge Fernandez toward Petitioner in a prior case which Petitioner had in front of him require that he recuse himself from hearing this case under 28 U.S.C. §§ 455(a) and (b)(1)?

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3. A DISGRUNTLED PARTNER CANNOT AVOID THESE JURISDICTION AND DUE PROCESS ISSUES BY NAMING THE PLEADING BY WHICH HE SEEKS TO BRING THE PARTNERSHIP AND THE NON-CONSENTING PARTNERS, OR ALL OF THEIR ASSETS, INTO BANKRUPTCY A "COMPLAINT" RATHER THAN AN "INVOLUNTARY PETITION." . 16

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PETITION FOR WRIT OF CERTIORARI

Petitioner ROBERT L. RENTTO respectfully requests this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered herein on October 12, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in Robert L. Rentto v. Howard Justus is reproduced in the Appendix (hereafter "App.") at App. 1-7 and the order of the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc is reproduced at App. 8-9. The opinion of the Bankruptcy Appellate Panel which the Ninth Circuit Panel Majority affirmed is reproduced at App. 10-25, the opinion of the bankruptcy court disallowing Petitioner's claim is reproduced at App. 26-31 and the May 15, 1987 order is reproduced at App. 32-39.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its decision in this matter on October 12, 2001 (App. 1-7). Petitioner timely filed his petition for rehearing and rehearing en banc. The Court of Appeals denied his petition on December 5, 2001 (App. 8-9).

This petition for certiorari was filed within 90 days of said denial. This Court has jurisdiction to review the judgment or decree of a federal court of appeals by way of a writ of certiorari under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Four families owned a chain of restaurants and other assets principally through a corporation by the name of Jimmy's Family of Fine Restaurants, Inc. which was the successor to the partnerships that had previously owned those restaurants and assets. Three of those families formed a new corporation by the name of D.W.G.K. Restaurants, Inc. and

filed voluntary Chapter 11 bankruptcy petitions for themselves and for their new corporation. They then filed a complaint against Jimmy's Family of Fine Restaurants, Inc. and the fourth family (hereafter collectively referred to as the "Kaye Group") seeking an order from the bankruptcy court consolidating and turning all of the assets of the Kaye Group over to their bankruptcy estates.

After 15 months of pre-trial proceedings, the matter was tried by the bankruptcy court which found the Jimmy's Family of Fine Restaurants, Inc. corporation to have been a partnership and not a corporation.

More precisely, the bankruptcy court found that the partnerships which owned the assets still owned those assets because they had never been properly transferred to the Jimmy's Family of Fine Restaurants, Inc. corporation. The bankruptcy court entered judgment ordering all of the assets

of the Kaye Group, including the fourth family presumably under § 723 of the Bankruptcy Code, turned over to the bankruptcy estates of the other three families and their D.W.G.K. corporation and ordering that all creditors of the non-debtor entities file proofs of claim against the bankruptcy estates.

We acted as the attorneys for the Kaye Group defending them against this proceeding in the bankruptcy court. We filed our proof of claim for attorneys fees owed to us by the Kaye Group for fees rendered over that 15 month period.

Respondent Howard Justus, who was appointed to act as the Special Examiner for the bankruptcy estates objected to our claim, principally on the ground that our services had been rendered after the petitions commencing the bankruptcies were filed by the three bankrupt partners and thus would not be allowable as a claim against their bankruptcy estates under § 101(10)(A) of the Bankruptcy

Code. We believed that was irrelevant.

REASONS FOR GRANTING CERTIORARI

There are two important federal principles in which this decision conflicts with the only reported cases. Those are no bankruptcy jurisdiction and due process.

1. Once the bankruptcy court determined that the target entity of the proceeding brought by the three bankrupt partners was a partnership or partnerships the bankruptcy court had no jurisdiction over the target entities and its non-consenting partners except by deeming the proceeding to be "de facto an involuntary petition." In re Memphis Friday's Associates, 88 B.R. 821, 827 (Bkcy. W.D. Tenn. 1988); In re SWG Associates, 199 B.R. 557, 560-561 (Bkcy. W.D. Pa 1996).

We invite the Court's attention to In re Cloverleaf Properties, 78 B.R. 242, 246 (9th Cir. BAP 1987) where that panel found

"that the bankruptcy court lacked jurisdiction

to enter its turnover order"

and remanded the case to the bankruptcy court "for entry of an order dismissing the case."

2. Both Memphis-Friday's and Cloverleaf held that due process requires the Court to protect the procedural rights of the non-filing partners including "the partnership itself, its partnership assets and its creditors" 88 B.R. at 827.

We are such a creditor.

3. The fact that the bankrupt partners named the pleading by which they took the partnerships and their non-consulting partners' assets into bankruptcy a "complaint" rather than an "involuntary petition" did not avoid the jurisdictional and due process requirements.

4. Further, Judge Fernandez in Petitioner's prior case before him had "a personal bias or prejudice concerning" Petitioner such that "his imparticularly might reasonably be questioned." This resulted in "such a high degree of ... antagonism as to make fair judgment impossible," Liteky v.

U.S., 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed. 2d. 474 (1994), or in the language of the concurrence in Liteky

> "[U]nder §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." 510 U.S. at 558, 114 S.Ct. at 1158.

Judge Fernandez' refusal seriously to consider these issues including misquoting the May 15, 1987 order demonstrates the sort of bias and prejudice which prevented us from having a fair hearing on these important issues.

1. A BANKRUPTCY FOR A PARTNERSHIP COMMENCED BY FEWER THAN ALL OF THE GENERAL PARTNERS IS AN INVOLUNTARY BANKRUPTCY.

We first invite the Court's attention to the following from Collier on Bankruptcy:

> "Federal Rule of Bankruptcy Procedure 1004(a) governs commencement of a

> voluntary partnership case. That Rule states that if all of the general partners consent to a voluntary petition, they need not all sign the petition ... When some or all of the general partners do not consent to the filing of a voluntary petition, an involuntary petition may be filed by fewer than all of the general partners ..." 9 Collier on Bankruptcy (15th Ed. Revised) 1004-2-3.
>
> "Under § 303(b)(3)(A), if all of the general partners do not consent to a voluntary filing, a filing by fewer than all the general partners is treated as an involuntary case." 2 Collier on Bankruptcy (15th Ed. Revised) 303-46.

We next invite the Court's attention to the following from In re SWG Associates, 199 B.R. 557, 558 (Bkcy. W.D. Pa 1996).

> "This Court felt compelled, and moreover ascertained that it was required pursuant to F.R.B.P. Rule 7012(b) and Rule 12(h)(3) of the Federal Rules of Civil Procedure, to raise these concerns sua sponte because they ultimately implicate the subject matter jurisdiction of this Court regarding this bankruptcy case. More specifically, if the bankruptcy petition in this case was filed improperly, then a bankruptcy case was not commenced under either §§ 301 or 303 of the Bankruptcy Code. If a case was not commenced under either of these sections,

> then this matter is not a case under Title 11 of the United States Code and a United States District Court (as well as a Bankruptcy Court such as this one) would, therefore, lack jurisdiction over it pursuant to 28 U.S.C. § 1334(a). If this Court lacks subject matter jurisdiction over a matter it must, of course, dismiss the matter. F.R.B.P. Rule 12(h)(3)."

However, the SWG Court rather than dismissing the petition went on to note as follows 199 B.R. at 560-561:

> "Additionally numerous courts hold 'that a petition filed ... without the consent of all general partners ... [is] in effect always an involuntary petition.' In re Memphis-Friday's Associates, 88 B.R. 821, 825 (Bkcy W.D. Tenn. 1988) (citing In re Cloverleaf Properties, 78 B.R. 242, 244 (9th Cir. BAP 1987), which in turn cited In re Seychelles, 30 B.R. 72, 74 (Bkcy N.D. Tex. 1982) and In re Baker, 54 B.R. 743, 746 (Bkcy. E.D. Tenn. 1985))
>
> This Court agrees with this conclusion and, thus, holds that the amended bankruptcy petition in this case is de facto an involuntary petition ...
>
> Since this case will not be dismissed at this time, and because the amended petition will prospectively be viewed as an involuntary one, the procedural safeguards of an involuntary case must now be followed." 199

B.R. at 560-561.

An effort to bring a partnership into bankruptcy voluntarily by the consent of less than all of the general partners is an improper voluntary filing.

> "The unique issue of this case is how to treat, procedurally, an improper voluntary filing in the present fact situation. The court will put the parties in interest where they would have been on April 30, 1988 had the petition been properly filed as an involuntary one. Since the original filing was de facto involuntary, the court will permit Mr. Gotten, on behalf of Maruki Tennessee 'F,' Inc., to amend the original petition by substitution of an involuntary cover sheet. See Bankruptcy Official Form F12. The filing date of April 30, 1988 will remain the same for the involuntary petition. Summons must issue to the other general partner, Kenmare Associates. See Bankruptcy Official Form 13 ...
>
> Maruki Tennessee 'F,' Inc. asserts that the court should not disturb the order for relief which was entered on April 30, 1988 ...
>
> The court cannot presume any motives on behalf of Kenmare Associates nor other entities. Rather, the court is required to enforce clear Bankruptcy Code provisions concerning involuntary filings. Section

303(h) of the Code specifically provides that the order for relief shall not be entered until after either default in an answer or after trial and a judicial finding that the involuntary debtor is in fact a debtor. As a bankruptcy court in Texas has recently pointed out, under Section 303, a general partner files an involuntary petition not for but against the partnership. By its very filing of an involuntary petition, the filing general partner initiates an adversary proceeding and becomes an adversary party. In re BC&K Cattle Co., 84 B.R. 69, 70 (Bkcy. N.D. Tex. 1988) citing Bankruptcy Rule 1011. The BC&K Cattle Co. Court was concerned about the due process protections and possible due process violations concerning non-consenting partners, as is this court ...

This court can find no Code provision or authority for allowing the order for relief to stand Rather, the Code is clear that the order for relief is not effective in this case until a judicial determination is properly made pursuant to Section 303(h). [citation] Therefore, the court has no choice ... but to vacate the April 30, 1988 order for relief. The vacating of this order, accompanied by the amendment of the original petition, simply puts the parties in the position they would have been in on April 30, 1988 had the petition been properly and originally filed as an involuntary one ...

No purpose will be served in the present case

> by a dismissal now. 'An involuntary case culminates either in an order for relief or in dismissal. If an order for relief is granted, the case proceeds in the same manner as would a voluntary case.' [citation]" In re Memphis Friday's Associates, 88 B.R. 827-828.

Once the bankruptcy court determined that the Jimmy's entity was a partnership, the fact that all of the partners did not consent to the bankruptcy meant that the bankruptcy court had no jurisdiction unless this was deemed "de facto an involuntary petition," 199 B.R. at 561, 88 B.R. at 827.

2. DUE PROCESS REQUIRES THAT THE NON-DEBTOR PARTNER AND NON-DEBTOR PARTNERSHIP OR ALL OF THEIR ASSETS TAKEN INTO BANKRUPTCY AND THEIR CREDITORS BE GIVEN THE PROCEDURAL PROTECTIONS OF AN INVOLUNTARY CASE.

We first invite the Court's attention to the following

from Memphis-Friday's, 88 B.R. at 826-827.

> "As in the Cloverleaf case, this court will protect the 'procedural due process rights of non-filing partners,' 78 B.R. at 245. The procedural due process concerns affect not only [the non-consenting partner] but the partnership itself, its partnership assets and its creditors. This court will not knowingly disregard those due process protections ..."

We also invite the Court's attention to the following from In re SWG Associates, 199 B.R. at 561.

> "Since this case will not be dismissed at this time, and because the amended petition will prospectively be viewed as an involuntary one, the procedural safeguards of an involuntary case must now be followed."

Those due process procedural protections include the ability of the non-bankrupt target entities to pay their attorneys and other creditors whose claims arise between commencement of the adversary proceeding and entry of the order taking the non-debtors or all of their assets into bankruptcy.

This issue arises from the fact that the Bankruptcy

Code typically deals with voluntary petitions where the order for relief is entered at the commencement of the case when the petition is filed, §§301, 102(6), Historical and Statutory Notes to Section 102, Paragraph (6), so that the estate only pays claims existing as of the date of filing the petition, §502(b).

Where substantial time is consumed in litigation to determine whether the target entity should be administered in bankruptcy, and the order for relief thus is not entered until some substantial time after the commencement of the litigation, the solution which the Bankruptcy Code adopts is to allow the target entity to continue to operate pending entry of the order for relief against that entity, §303(f), and then to deem claims of creditors arising after the petition but before the order for relief to arise "before the date of the filing of the petition," §502(f). Thus, §502(b) does not bar post-petition but pre-order for relief claims.

We invite the Court's attention to the fact that the

complaint attempting this involuntary takeover of the Kaye Group by the three bankrupt partners was filed in December 1985 and Memorandum Decision was not entered until April 21, 1987. Our services were provided during that 1985-1987 gap.

Our claim for post-petition but pre-order for relief services should be deemed to arise pre-petition, §502(f), as a "gap" claim under §§303(f) and 507(a)(2).

The present decision which we ask this Court to review permits denial of the claims of involuntary gap creditors where the attack on the target entity is brought by a pleading named a "complaint" rather than an "involuntary petition." Due process does not permit the rights of such partners and creditors to be subverted in such a manner.

3. A DISGRUNTLED PARTNER CANNOT AVOID THESE JURISDICTION AND DUE PROCESS ISSUES BY NAMING THE PLEADING BY WHICH HE SEEKS TO

BRING THE PARTNERSHIP AND THE NON-CONSENTING PARTNERS, OR ALL OF THEIR ASSETS, INTO BANKRUPTCY A "COMPLAINT" RATHER THAN AN "INVOLUNTARY PETITION."

The Panel Majority disposes of this issue by noting that:

> "this was not [an involuntary bankruptcy proceeding]. It was simply an adversary proceeding which ended in the seizure of the assets of the Kaye Group ..." (App. 3-4)

(The theory on which the assets of the Kaye Group were brought into the bankrupt partners' bankruptcy was that this business was a partnership.)

That dispositive statement of the Panel Majority ignores that by the:

> "filing of an involuntary petition, the filing general partner initiates an adversary proceeding ..." Memphis-Friday's, 88 B.R. at 528.

An involuntary bankruptcy proceeding is an adversary

proceeding, contrary to this dispositive statement of the Panel Majority.

Fewer than all of the general partners cannot involuntarily seize the assets of their partnerships and their non-bankrupt partners free of the jurisdiction and due process protections of an involuntary bankruptcy by simply naming the pleading "complaint" rather than "involuntary petition."

It becomes a de facto involuntary petition.

4. THE BIAS AND PREJUDICE OF JUDGE FERNANDEZ AGAINST PETITIONER, WHERE HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED, REVEALED SUCH A HIGH DEGREE OF ANTAGONISM AS TO MAKE FAIR JUDGMENT IMPOSSIBLE. WE COULD NOT RECEIVE A FAIR HEARING.

Petitioner appeared before Judge Fernandez in a prior matter when Judge Fernandez ruled against Petitioner's client based in large part on an opinion from the Fifth Circuit.

That opinion was a second opinion by the Fifth Circuit in the same case. The earlier opinion of the Fifth Circuit, which Judge Fernandez did not address, compelled a decision in favor of Petitioner's client.

Petitioner raised that issue on his petition for rehearing and suggest rehearing en banc. That petition was summarily denied without addressing the prior opinion of the Fifth Circuit in that case.

When Petitioner learned that Judge Fernandez was on the Panel assigned to hear this case, Petitioner immediately filed his declaration requesting recusal of Judge Fernandez under 28 U.S.C. 455 Sections (a) and (b)(1) and assignment to a different panel. That was summarily denied. As this Court has pointed in Liteky v. U.S., 510 U.S. 540, 555, 144 S.Ct. 1147, 1157, 127 L.Ed. 2d. 474 (1994) such recusal is mandated where a judge has:

> "such a high degree of ... antagonism as to make fair judgment impossible."

That is articulated by the concurrence in Liteky, 510 U.S. 558, 114 S.Ct. 1158 as follows:

> "Thus, under § 455(a) a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute."

Let us now turn to the Memorandum filed October 12, 2001 in this case.

We invite the Court's attention to the way in which the Panel Majority treated the first issue that our claim was for services that were rendered after the bankrupt partners filed their bankruptcy petitions citing § 101(5) of the Bankruptcy Code and § 101(10)(A) of the Bankruptcy Code. That does not properly construe our claim.

§ 101(10)(A) defines a "creditor" as one with:

> "a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

Our claims were not against the bankruptcy debtors. Further, the order for relief concerning the bankruptcy debtors, which

is the date the bankrupt partners filed their bankruptcy petitions, was not the order for relief concerning the Kaye Group by whom our claims were owed.

As the discussion of order for relief in Memphis-Friday's, makes clear, the order for relief concerning the Kaye Group was the order after the adversary proceeding was tried.

The Panel Majority next addresses our claim as a part of the Kaye Group creditors, noting:

> "We recognize that the bankruptcy court's order of May 15, 1987, provided for allowable claims of the Kaye Group's creditors but that does not advance the argument because, as that order indicated, it was speaking of 'pre-petition claims,' that is, those which were in existence before the debtor filed its petition. Still again, that does not encompass Rentto's claim." (App. 2-3)

As the Court will note, the portion of the May 15, 1987 order referring to "pre-petition claims" (App. 37) referred to pre-petition claims only as those which it was equitably subordinating, which the Panel Majority indicated in Footnote 3 (App. 5), at least for purposes of this opinion,

did not include our claim.

Let us now consider the effect of the order of the Panel Majority affirming the decision of the Bankruptcy Appellate Panel. The BAP decision is attached at App. 10-25.

5. ITS APPEARS FROM COMPARING THE BAP OPINION AND THAT OF THE PANEL MAJORITY THAT THE PANEL DISSENT HAD IT RIGHT. BASED ON THE EVIDENCE, OUR CLAIM SHOULD HAVE BEEN ALLOWED AS A GENERAL UNSECURED CLAIM. THAT THE PANEL MAJORITY RULED AGAINST US ON AN ERRONEOUS READING OF THE MAY 15, 1987 ORDER, AND DID NOT ADDRESS THE "DE FACTO INVOLUNTARY PETITION DOCTRINE IS THE TRUE MARK OF THE BIAS AND PREJUDICE OF JUDGE FERNANDEZ AGAINST PETITIONER DEPRIVING US OF A FAIR HEARING.

Recall that our claim was disallowed by the bankruptcy court (App. 32-39) on three grounds which were (i) equitable subordination, (ii) not an involuntary gap claim and (iii) not an unsecured claim because it arose after the bankruptcy petitions were filed by the three bankrupt partners.

Equitable Subordination

We invite the Court's attention first to the BAP opinion on this issue.

> "In this case, there was no finding that the Rentto firm was an insider, and the firm's mere legal representation of a resisting group whose assets were eventually brought into the bankruptcy estate, does not rise to the level of bad faith, fraud, overreaching or spoilation required by a non-insider by § 510 (c)(1). [citation] There was no allegation, and the record does not support the notion, that the Rentto firm did anything other than zealously and equitably represent its clients to the best of its ability. Thus, the record is insufficient to support a § 510(c) equitable subordination finding." (App.23-24)

The Panel Majority, consistent with the BAP opinion that the record did not support equitable subordination of our

claim, did not reach that issue. We invite the Court's attention to Footnote 3.

> "[3] We need not, and do not, decide whether Rentto's claim, if he had one, could properly be subordinated to the claims of other creditors under the bankruptcy court's order of May 15, 1987 or under 11 U.S.C. 510(c). On this record, which gives no indication of any impropriety on his part, we are very dubious, but, again, we do not decide the issue." (App. 5)

Thus, equitable subordination does not appear to be a ground for affirmance of the bankruptcy court by the BAP and it was not a ground for affirmance of the BAP by the Panel Majority.

Unsecured Claim

The BAP opinion on this issue appears to allow our claim as an unsecured claim.

The BAP noted that our claim did not fit within 11 U.S.C. §§ 101(5) and 101(10)(A). We have previously noted that it does fit if "debtor" is defined as our debtor and the "order for relief concerning the debtor" is defined as the order

for relief concerning our debtor. The date the bankruptcy debtor's filed their petition is irrelevant.

The BAP then held:

> "Nevertheless, Rentto contends his claim is an allowable claim against the Kaye Group includable in the Kaye Group liabilities which in turn were substantively consolidated into the DWGK estate by the court's May 15, 1987 order and the confirmed plan. The firm's post-petition claim would, Rentto argues, thus be deemed a general unsecured claim because it is a valid claim against the Kaye Group and all of the Kaye Group's allowable prepetition liabilities were substantively consolidated with the DWGK estate. Apparently accepting this premise, the bankruptcy court further ruled that the claim was nevertheless equitably subordinated." (App. 21)

Since equitably subordination is now out, the BAP would appear to have allowed our claim on this theory on that ground.

It is here that the bias and prejudice damages our claim. The Panel Majority denies our claim based on an erroneous reading of the May 15, 1987 order (App.37). The word "pre-petition" applies only to equitable subordination

and equitable subordination is no longer in this case.

As the Panel Dissent notes,

> "The consolidation also made 'allowable claims' good against the DWGK bankruptcy estate ... [T]he court order gave him and other Kaye Group creditors such a claim, to avoid inequity from the consolidation of assets." (App. 6)

Taking the Kaye Group's assets without providing for their creditors would have been at the least a fraudulent transfer under § 548 of the Bankruptcy Code. The Panel Majority does not discuss such issues, but rules against us on an erroneous reading of Article IV of the May 15, 1987 order. (App. 37)

The Panel Majority then ignores the jurisdiction and due process issues of permitting non-debtor partnerships and partners, or all of their assets, to be taken into bankruptcy on pleadings signed by fewer than all of the general partners without the protection of an involuntary petition. It ignores the "de facto involuntary petition" doctrine.

That is the true measure of failure of Judge Fernandez to give us a fair hearing.

Conclusion

We did not get a fair hearing before Judge Fernandez under either of the tests of the majority or the concurrence in Liteky. The Panel Majority incorrectly read the May 15, 1987 order. The Panel Majority then ignored the jurisdiction and due process issues of a non-debtor partnership and partners and a "de facto involuntary petition." This is the only Court to which we can bring what appears a violation of 28 U.S.C. § 455(a) and (b)(1) by a judge of a court of appeal.

But the principal issue on which we ask this Court to grant review is the de facto involuntary petition doctrine. The jurisdiction and due process issues which arise from a bankruptcy filing by fewer than all of the general partners of a partnership, and the simple way to remedy that by extending the procedural protections of an involuntary bankruptcy, merit review by this Court.

Otherwise, the loophole left by the Panel Majority in this case remains as a way for fewer than all of the general partners of the partnership to take over a partnership or at least its assets and their non-bankrupt partner's assets without complying with the procedural protections which Congress enacted.

Dated: March 1, 2002

Respectfully submitted;

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APPENDIX A - MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 12, 2001 - NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: D.W.G.K. RESTAURANTS, INC., dba JIMMY'S FAMILY OF FINE RESTAURANTS, et al. Debtor.	)No. 00-55144))BAP No. SC-98-)01368-MaPRy)
ROBERT L. RENTTO, Appellant, v. HOWARD JUSTUS, Appellee.	)MEMORANDUM*))))))))

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Marlar, Perris, Ryan, Judges,
Presiding

Argued and Submitted September 12, 2001
Pasadena, California

Before: FERNANDEZ, KLEINFELD, and McKEOWN, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit Rule 36-3.

Robert Rentto appeals the Bankruptcy Appellate Panel's decision which affirmed a bankruptcy court order disallowing his claim for approximately $250,000 in legal fees and costs against the bankruptcy estate of D.W.G.K. Restaurants, Inc. (the Debtor).

Rentto represented the advers parties (the Kaye Group) in an adversary proceeding brought by the Debtor.[1] Rentto's client lost the action in 1987. He now seeks recovery

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[1] In fact, Rentto is the successor in interest to Stutz, Rentto, Gallagher & Artiano, the law firm that represented the Kaye Group in the adversary proceeding. Incidentally, in 1987 the law firm sought an order authorizing payment of the same fees, but the bankruptcy court denied fees because there had been no benefit to the Debtor's estate, that was no basis to appoint and pay counsel for representing adverse parties, under the circumstances fees would be unjustified, and standards for a nunc pro tunc appointment were not met.

for the services rendered in representing the adverse parties.

(1) Rentto filed a creditor's claim in this proceeding, but he cannot prevail on that because all of his services were rendered after the inception of this bankruptcy. A claim is a "right to payment." 11 U.S.C. § 101(5). As relevant here, a creditor is one who "has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10(A). Again, that does not define Rentto's situation. We recognize that the bankruptcy court's order of May 15, 1987, provided for allowable claims of the Kaye Group's creditors, but that does not advance the argument because, as that order indicated, it was speaking of "pre-petition claims," that is, those which were in existence before the Debtor filed its petition. Still again, that does not encompass Rentto's claim.

(2) Rentto then asserts that he should receive the fees because the proceeding against the Kaye Group was like an

involuntary bankruptcy, and the firm's work for the Kaye Group was like the work of one who was representing the prospective involuntary bankrupt. It is true that a so-called gap claim can be allowed when there is an involuntary bankruptcy proceeding. See 11 U.S.C § 502(f); Hamilton v. Lumsden (In re Geothermal Res. Int'l, Inc.), 93 F.3d 648, 651 & n.1 (9th Cir. 1996). But this was not that. It was simply an adversary proceeding, which ended in the seizure of assets of the Kaye Group on the theory that those assets belonged in the Debtor's bankruptcy. That did not make the Kaye Group members bankrupts, nor did it confer upon them the benefits of bankruptcy proceedings. Rather, Rentto could still pursue them for his fees or if they filed separate bankruptcies, he could file claims in their estates.[2] Thus, if this was like an involuntary bankruptcy in some ways, a simile is still not an

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2 Rentto indicates that some members of the Kaye Group have, indeed, since filed for bankruptcy.

identity, or even an allotrope.[3] We are very sympathetic to Rentto's plaintive assertion that it is a hard thing for his clients to lose their case, their assets, and their ability to pay for his professional services, but the law does not protect him. Those who are drawn into the bankruptcy maelstrom often suffer great losses, and even lawyers who never encounter it often lose their fees when their clients lose their cases.

AFFIRMED.

Rentto v. Justus, 00-55155, Filed October 12, 2001.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

When Rentto represented the Kaye Group, it had not filed for bankruptcy. Rentto's claim against his client for his

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We need not, and do not, decide whether Rentto's claim, if he had one, could properly be subordinated to the claims of other creditors under the bankruptcy courts's order of May 15, 1987, or under 11 U.S.C. § 510(c). On this record, which gives no indication of any impropriety on his part, we are very dubious, but, again, we do not decide the issue.

fees never suffered from the infirmity of representing a bankruptcy estate without court approval.

Although the Kaye Group's assets were consolidated with the D.W.G.K. bankruptcy estate, that did not mean the Kaye Group's creditors, like Rentto, could only pursue their claims against the now stripped Kaye Group. The consolidation also made "allowable claims" good against the D.W.G.K. bankruptcy estate.

Rentto's claim would not have been allowable had he represented D.W.G.K. after the filing without court approval, but he did not do that. Although Rentto would ordinarily have no claim against D.W.G.K. for representing its adversary, the court order gave him and other Kaye Group creditors such a claim, to avoid inequity from the consolidation of assets. He is an innocent Kaye Group creditor, so far as the record shows, whose claim should, under the consolidation order, follow the Kaye Group's assets

into the D.W.G.K. bankruptcy

APPENDIX B - ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC FILED DECEMBER 5, 2001 - NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: D.W.G.K. RESTAURANTS, INC., dba JIMMY'S FAMILY OF FINE RESTAURANTS, et al.	)No. 00-55144))BAP No. SC-98-)01368-MaPRy
Debtor.	)
	)ORDER DENYING
ROBERT L. RENTTO,	)PETITION FOR)REHEARING AND
Appellant,	)FOR REHEARING
v.	)EN BANC)
HOWARD JUSTUS,	))
Appellee.	)

Before: FERNANDEZ, KLEINFELD, and McKEOWN, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C - MEMORANDUM FILED NOVEMBER 26, 1999 - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: D.W.G.K. RESTAURANTS, INC., dba JIMMY'S FAMILY OF FINE RESTAURANTS, et al.	)BAP No. SC-98-)01368-MaPRY)
	)Bk. No. 85-06182-H11
Debtor.	)
	)
ROBERT L. RENTTO,	)
	)MEMORANDUM[1]
Appellant,	)
v.	)
	)
HOWARD JUSTUS,	)
	)
Appellee.	)
	)

Argued and Submitted on September 22, 1999
at San Diego, California

Filed - November 26, 1999

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel. See Ninth Circuit BAP Rule 13 and the Ninth Circuit Rule 36-3.

Appeal from the United States Bankruptcy Court
For the Southern District of California

Honorable John J. Hargrove, Bankruptcy Judge, Presiding

Before: MARLAR, PERRIS, and RYAN Bankruptcy Judges.

FACTS

The debtor, D.W.G.K. Restaurants ("DWGK") and its individual principals filed chapter 11 petitions in 1985 and 1986. Its primary assets consisted of minority stockholders' interests in a chain of restaurants and other investments. The majority shareholders, collectively referred to as the "Kaye Group," did not participate in the filings.

In the course of the DWGK case, the Kaye Group found itself the defendant in an adversary proceeding, the purpose of which was to bring the Kaye Group's assets and liabilities within the umbrella of the DWGK bankruptcy. The appellant, Robert L. Rentto ("Rentto"), was a member of the law firm which defended the Kaye Group in that proceeding.

He now owns the law firms's receivable. Ultimately, the Kaye Group lost the litigation, and a plan of reorganization was confirmed that incorporated the court's ruling in the adversary proceeding. The adversary proceeding against the Kaye Group was reduced to an order on May 15, 1987, and is now a final order. The order did not award attorneys' fees and costs to the Kaye Group. The order also substantively consolidated the assets and liabilities of the Kaye Group with he DWGK estate, and, further, equitably subordinated all "allowable prepetition claims of the Kaye Group" to the claims of the DWGK general creditors.

The debtor's plan of reorganization dated June 27, 1986, was confirmed, which provided the vehicle for substantive consolidation. The confirmation order is also final.

On June 26, 1987, the Rentto firm filed an application for nunc pro tunc employment and for an award of attorneys'

fees and costs for its representation of the Kaye Group in the unsuccessful defense of the adversary proceeding. The Kaye Group sought administrative expense status for $236,745.90. That application was denied, and the July 29, 1987 order is final.

The Rentto firm also filed a proof of claim, designated as No. 80, to which the court-appointed examiner, appellee Howard Justus, objected. In a hearing held on April 21, 1998, the court explained its rationale for sustaining the objection to claim No. 80, and it disallowed the claim. Alternatively, the court equitably subordinated the Rentto claim to the claims of the general creditors.

On May 5, 1998, the court entered its order, after which this appeal was timely filed.

ISSUES

1. Whether the court abused its discretion by disallowing the Rentto claim as an administrative, "gap," or

unsecured claim for attorneys' fees incurred for the Kaye Group's unsuccessful defense of the adversary proceeding litigation.

2. If the Rentto firm's claim were allowable as a claim against the Kaye Group, whether the court abused its discretion by equitably subordinating the claim.

STANDARD OF REVIEW

Denial of a request for attorneys' fees is reviewed for an abuse of discretion. In re Riverside-Linden Inv. Co., 945 F.2d 320, 322 (9th Cir. 1991). The panel reviews de novo any elements of legal analysis and statutory interpretation which figured in the award. Haworth v. State of Nev., 56 F.3d 1048, 1051 (9th Cir. 1995). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. In re Lazar, 83 F.3d 306, 308 (9th Cir. 1996).

A bankruptcy court's decision regarding equitable subordination pursuant to 11 U.S.C. § 510(c) is reviewed for

an abuse of discretion. In re Filtercorp, Inc.., 163 F3d 570, 583 (9th Cir. 1998).

DISCUSSION

A. Administrative Claim

The Rentto firm applied for fees and costs as an administrative expense of the DWGK bankruptcy case. That application was denied because the Rentto firm had not been appointed to represent the interests of the estate; the unsuccessful defense of litigation designed to enhance the estate was adverse to the estate; and no benefit was rendered to the estate. In fact, the Rentto firm performed services for the benefit of some of the partners of the debtor but not of the debtor entity itself. Section 503, which provides for the allowance of administrative expenses, should be narrowly construed to keep administrative costs to a minimum and thereby further the debtor's rehabilitation. Grantham v. Eastern Marine, Inc., 93 B.R. 752, 753 (Bankr. N.D. Fla.

1988). As there was no basis upon which to award the Rentto firm an administrative expense against the estate, the court correctly denied the application in the instant proceeding.

Moreover, the court's order denying compensation and making findings that the Rentto firm's services did not benefit the estate became a final order years ago. A determination of whether the claim is allowable now as an administrative claim for professional compensation is res judicata. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979). This appeal is a disguised collateral attack of a prior order of the bankruptcy court, which involved the same parties, and which resolved that dispute in 1987. This is impermissible, and the trial court did not err, to the extent it refused to resurrect these old arguments. See Watts v. Pinckney, 752 F.2d 406, 410 (9th Cir. 1985).

B. "Gap" Claim

The Rentto firm nevertheless maintains that the

bankruptcy court should equate its claim to a "gap" claim under 11 U.S.C. § 502(f). The problem with the Rentto firm's argument is found in the statute itself. Such claim is only arise "[i]n an involuntary case, " and the claim must have arisen "in the ordinary course" of an involuntary debtor's business. Id. This section is meant to protect tradesmen and other vendors who extend usual services or sell goods on credit during the hiatus between the filing of an involuntary petition and the entry of an order for relief. See S. Rep. No. 95-989, 95th Cong., 2d Sess. 65, reprinted in 1978 U.S.C.C.A.N. 5787, 5851.

Since the cases were not involuntary ones, and since the Rentto firm's claim was not for an ordinary operating expense, the claim fails on both prongs to meet the statutory criteria for allowance of a "gap" claim. See In re Manufacturer's Supply Co., 132 B.R. 127, 129 (Bankr. N.D. Ohio 1991).

The broad purpose underlying the bankruptcy law is to bring about an equitable distribution of the debtor's estate to its creditors. Nathanson v. N.L.R.B., 344 U.S. 25, 29, 73 S.Ct. 80, 83, 97 Led. 23 (1952). A priority, therefore, should arise clearly from the code. In re William B. Kessler, Inc., 23 B.R. 722, 725 (Bankr. S.D.N.Y. 1982), aff'd, 55 B.R. 735 (S.D.N.Y. 1985) (rejecting debtor's argument that withdrawal liability obligation was entitled to administrative priority). Furthermore, a bankruptcy court's equitable powers are circumscribed by the Code. Norwest Bank Worthington v. Ahlers, 485 U.S. 197. 206, 108 S.Ct. 963, 968-69, 99 L.Ed.2d 169 (1988). Here, the bankruptcy court was correct in its disallowance of claim no. 80 on the stated grounds.

C. Unsecured Claim

The court denied the Rentto firm's claim as an unsecured creditor because its services occurred post-petition. The Code defines a creditor's claim as a right to payment at

the time the DWGK bankruptcy petition was filed. 11 U.S.C. §§ 101(5)(A) and 101(10)(A). Therefore, it was not payable from the estate, pursuant to § 502(a), which provides for the "[a]llowance of claims or interests."

Moreover, the services were rendered only to certain shareholders who were litigating in opposition to the interests of the bankruptcy estate. The estate, after several trial days, prevailed on its claims for recovery of money, property and related relief against Rentto's clients. Because the court, in that litigation, did not grant attorneys' fees to the losing parties, the Rentto firm had no independent basis upon which to request fees and costs from the very bankruptcy estate which waged extensive litigation against its clients.

Additionally, there is no authority presented in the briefs or record for treating the failed administrative claim as a general unsecured claim. Allowance of post-petition claims is generally made in accordance with plain exceptions to the

Code. In re Glover, 107 B.R. 579, 581 (Bankr. S.D. Ohio 1989). General unsecured status is given for certain post-petition claims. See e.g., In re Palau Corp., 18F.3d 746, 749 (9th Cir. 1994) (wage claims that are not entitled to administrative priority are treated as general unsecured claims pursuant to 11 U.S.C. § 507(a)(3)), or 11 U.S.C. § 502(g) (deeming claims arising from post-petition contract rejection as prepetition claims).[2]

The Rentto firm's claim did not meet the Code requirements for either administrative expense priority or unsecured status. No Code or case authority is provided to support the treatment of the Rentto firm's contention that its

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Rentto's failure to raise the alternative issue of his firm's entitlement to an unsecured claim in the June 26, 1987 application for attorneys' fees could also be viewed as a waiver of any entitlement to an unsecured claim. We are reluctant to so hold, however, in light of the independent claim allowance process which took place based on the separate proof of claim.

claim is a post-petition obligation of the debtor which must be paid by the estate.

Nevertheless, Rentto contends his claim is an allowable claim against the Kaye Group includable in the Kaye Group's liabilities, which in turn were substantively consolidated into the DWGK estate by the court's May 15, 1987 order and the confirmed plan. The firm's post-petition claim would, Rentto argues, thus be deemed a general unsecured claim because it is a valid claim against the Kaye Group, and all of the Kaye Group's allowable prepetition liabilities were substantively consolidated with the DWGK estate. Apparently accepting this premise, the bankruptcy court further ruled that the claim was, nevertheless, equitably subordinated.

D. Equitable Subordination

The court determined that even if the Rentto firm were entitled to unsecured status by virtue of its allowance as a

claim against the Kaye Group, its claim was equitably subordinated to the claims of other general unsecured creditors. To the extent the court construed its prior equitable subordination order to include the Rentto firm's claim among the Kaye Group claims in reaching this determination, then, indeed, the Rentto claim was equitably subordinated by virtue of that final order. See In re Franklin, 802 F.2d 324, 346 (9th Cir. 1986) (court has jurisdiction to construe its own prior orders).

Rentto contends that the court misconstrued its prior orders because it was not an insider who was guilty of misconduct. After reviewing the entire record, the panel cannot say that the bankruptcy court abused its discretion by determining that its prior orders equitably subordinated any and all claims of the insider Kaye Group. In re Roxford Foods, Inc., 12 F.3d 875, 878 (9th Cir. 1993) (panel reviews the court's refusal to vacate or reconsider its prior orders for

an abuse of discretion).

The court also equitably subordinated the Rentto firm's claim under 11 U.S.C. § 510(c)(1). In the Ninth Circuit, equitable subordination requires three elements: (1) the claimant has engaged in inequitable conduct; (2) which conduct injured creditors or the estate; and (3) such subordination must not be inconsistent with the Bankruptcy Code. In re Dominelli, 820 F.2d 313, 318-19 (9th Cir. 1987). Many times, a party's insider status is viewed as a prime reason for subordination. See In re Pacific Express, Inc., 69 B.R. 112, 116 (9th Cir. BAP 1986).

In this case, there was no finding that the Rentto firm was an insider, and the firm's mere legal representation of a resisting group, whose assets were eventually brought into the bankruptcy estate, does not rise to the level of bad faith, fraud, overreaching or spoilation required by a non-insider by § 510(c)(1). See N & D Properties, Inc., 799 F.2d 726, 731

(11th Cir. 1986). There was no allegation, and the record does not support the notion, that the Rentto firm did anything other than zealously and ethically represent its clients to the best of its ability. Thus, the record is insufficient to support a § 510(c) equitable subordination finding.

However, even if that finding and conclusion were erroneous, it would be nothing more than harmless error, since the claim was properly denied on each of the other grounds asserted by the Rentto firm, and since the final order of May 15, 1987 as well as the confirmed plan, equitably subordinated the Kaye Group's creditors to those of the DWGK estate.

CONCLUSION

The Rentto firm's post-petition claim No. 80 was not entitled to administrative priority; it was not a "gap" claim in an involuntary case. In addition, the failed administrative claim was not allowable as the prepetition general unsecured

claim against the estate. The bankruptcy court did not abuse its discretion by refusing to award compensation to the Rentto firm on those grounds. Furthermore, the bankruptcy court did not abuse its discretion in its alternative ruling, which determined that the claim, if deemed an allowable prepetition Kaye Group liability, was equitably subordinated by virtue of the court's prior final orders. The bankruptcy court's judgment of May 5, 1998, is AFFIRMED.

APPENDIX D - ORDER: (1) SUSTAINING OBJECTIONS TO CLAIM NO. 80; (2) DISALLOWING CLAIM NO. 80 OR, IN THE ALTERNATIVE, (3) EQUITABLY SUBORDINATING CLAIM NO. 80.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: D.W.G.K. RESTAURANTS, INC., dba JIMMY'S FAMILY OF FINE RESTAURANT,	)Bkcy. No. 85-06182-)H11 - Chapter 11)
Debtor.	)ORDER: (1))SUSTAINING)OBJECTIONS TO)CLAIM NO. 80;)(2) DISALLOWING)CLAIM NO. 80) OR, IN THE)ALTERNATIVE,)3 EQUITABLY)SUBORDINATING)CLAIM NO. 80.))Date: 4/21/98)Time: 10:00 a.m.)Dept: 3)Judge: Hon John J.)Hargrove

On April 21, 1998, the Motion for an Order to: (1) Disallow Claim No. 80 or, in the alternative, (2) Equitably Subordinate Claim No. 80 (the Claim Objection Motion) filed

by the duly appointed Special Examiner, HOWARD JUSTUS (the "Examiner"), came on regularly for hearing at 10:00 a.m. in Department 3 of the above-referenced Bankruptcy Court, the Honorable John J. Hargrove, presiding. Martin A. Eliopulos of Higgs, Fletcher & Mack LLP appeared on behalf of the Examiner; Robert L. Rentto ("Rentto") appeared on his own behalf as successor-in-interest to creditor Stutz, Rentto, Gallagher & Artiano ("SRG&A") as the claimant seeking to have Claim No. 80 allowed by the Bankruptcy Court. No other appearances were made.

After reviewing the papers and pleadings on file both in support and in opposition to the above-referenced motion, listening to the arguments of counsel and good cause appearing therefore, the Court finds that:

A. Claim No. 80, which consists of attorneys' fees and costs rendered on behalf of the "Kaye Group" by SRG&A, cannot be allowed as an administrative claim under

Bankruptcy Code § 330(a) and § 502(b)(2) because the Bankruptcy Court has already denied a fee application filed by SRG&A which application sought to have SRG&A approved as Bankruptcy Counsel for the Kaye Group and which sought reimbursement of the same post-petition fees and costs incurred on behalf of the Kaye group which are the subject of this claim objection;

B. Claim No. 80 cannot be allowed as an administrative expense under Bankruptcy Code § 503(b)(1) or Bankruptcy Code § 503(b)(3), (4) because said services did not preserve the estate nor did SRG&A failed to make a substantial contribution to the case;

C. Claim No. 80 cannot be allowed as a general unsecured claim under Bankruptcy Code § 502(b) because the services rendered and costs incurred all took place post-petition and do not represent a claim against any of the consolidated debtors of the above-referenced Chapter 11

bankruptcy estate;

D. Claim No. 80 cannot be allowed as an "involuntary gap" claim under Bankruptcy Code §§ 303(f) and 507(a)(2) because there was no involuntary bankruptcy filed in this case and, even if there were, the fees and costs which constitute the claim did not directly and substantially benefit the estate as required by applicable bankruptcy law;

E. Even if Claim No. 80 were allowed, the Bankruptcy Court has the power to equitably subordinate such claim under the Order of Substantive Consolidation, Equitable Subordination, Turnover and Order Granting Permanent Injunction entered by the Bankruptcy Court on May 15, 1987, and under the provisions of Bankruptcy Code § 510(c)(1);

F. For purposes of this motion, the Bankruptcy Court adopts the findings set forth in the Order Denying Application to be Appointed counsel and Denying Fee

Application of Stutz, Rentto Gallagher & Artiano, a true and correct copy of which is attached hereto and incorporated herein by reference as Exhibit "A"; and

G. Given the above-referenced findings, the Bankruptcy Court has specifically not ruled on the reasonableness of Claim No. 80.

Based on the foregoing findings, IT IS HEREBY ORDERED THAT:

1. The Claim Objection Motion is granted and the Examiner's objections to Claim No. 80 are hereby sustained;

2. Claim No. 80 is disallowed in its entirety ; and

3. Even if Claim No. 80 were allowed, Claim No. 80 is hereby equitably subordinated to the interests of all other allowable claimants or interest holders of the bankruptcy estate of D.W.G.K.

IT IS SO ORDERED.

DATE:_____

UNITED STATES BANKRUPTCY JUDGE

The signature by the attorney constitutes a certification under Fed R. Bank. P. 9001 that the relief provided by the order is the relief granted by the court.

SUBMITTED BY:

HIGGS, FLETCHER & MACK LLP

By:_____
MARTIN A. ELIOPULOS
Attorneys for Special Examiner
HOWARD JUSTUS

APPENDIX E - ORDER OF SUBSTANTIVE CONSOLIDATION, EQUITABLE SUBORDINATION, TURNOVER AND ORDER GRANTING PERMANENT INJUNCTION - ENTERED MAY 15, 1987

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: D.W.G.K. RESTAURANTS, INC., dba JIMMY'S FAMILY OF FINE RESTAURANTS, et al. Debtor.	)Adv. No. C85-1077-H11))Bk No. 85-06182-H11))ORDER OF
D.W.G.K. RESTAURANTS, INC., a California corporation, Plaintiff, v. PETER KAYE, MARY KAYE, MARY ANN POLLOS, RICHARD C. MASON, and DORIS JUNE RAMSEY, JIMMY'S FAMILY RESTAURANTS, TOO, KAYE AND WALTERS, INC., JIMMY'S FAMILY OF FINE FOODS RESTAURANTS, INC.,	)SUBSTANTIVE,)EQUITABLE)SUBORDINATION,)TURNOVER AND)ORDER GRANTING)PERMANENT)INJUNCTION))))))))

Trial in the above-captioned adversary proceeding was held on October 28 and 30, November 3, 4 and 6, 1986

and February 10, 12 and 24, 1987, before John J. Hargrove, Bankruptcy Judge. At all times, Wied & Smelko, through William A. Smelko, represented the plaintiff, D.W.G.K. Restaurants, Inc., ("D.W.G.K."). At all times, Stutz, Rentto Gallagher and Artiano, through attorneys Robert Rentto, Christopher Bakes and/or Julie Johnston represented the defendants Pete Theodore aka Peter Kaye, Mary Kaye, Jimmy's Family of Fine Restaurants, Inc., ("JFFR, Inc."), Jimmy's Family of Fine Restaurants, Too ("JFFR, Too") and Kaye and Walters, Corp. ("K&W") (collectively the "Kaye Group").

On March 2, 1987, at the confirmation hearing on D.W.G.K.'s Plan of Reorganization, the Court announced its intended decision in this adversary proceeding. On April 21, 1987 the Court issued its Memorandum Decision. Based upon the findings and conclusions announced at the March 2, 1987 hearing, those made pursuant to the hearing on the

preliminary injunction entered in this proceeding and the findings and conclusions contained in the Memorandum Decision; and good cause appearing therefor:

IT IS HEREBY ORDERED THAT:

I.

PERMANENT INJUNCTION

1. The Kaye Group, and each of them, are permanently restrained and enjoined from:

(i) contacting the operators, owners, managers, employees or suppliers of any property of the estate of D.W.G.K.;

(ii) entering into or operating any property of the estate of D.W.G.K. absent further order of the Court; and

(iii) transferring to any party, entity or individual any asset, cash or item of value which constitutes property of the estate.

II.

DECLARATORY RELIEF

2. D.W.G.K. is the owner of all right, title and interest in real, personal and business property identified as Units A-1 to A-10; B-1 to B-7; C-1 to C-3; and D-2 in D.W.G.K's approved Plan of Reorganization.

3. As against any defendant or any defendant's agent or assignee, title is quieted in D.W.G.K. to all real and personal property more particularly described in D.W.G.K.'s approved Plan of Reorganization as Units A-1 to A-10; B-1 to B-7; C-1 to C-3; and D-2.

4. D.W.G.K. d/b/a Jimmy's Family Restaurants is successor to a number of entities including: Jimmy's Family Restaurants, a California general partnership; Jimmy's Family Restaurant "F" Street; Jimmy's Family Restaurant-Oxford; Jimmy's Family Restaurant-Spring Valley; Jimmy's Family Restaurant-National City; Jimmy's Family of Fine Restaurants, Too, Inc.; Jimmy's, Inc.; Jimmy's Family

Restaurant, Inc.; Jimmy's Fireside; Jimmy's Family Restaurant F.C.V., Inc.; Jimmy's Family Restaurant L.M., Inc.; Jimmy's Family Restaurant L.G. Inc.; Jimmy's Family Restaurant S.V. Inc.; Jimmy's On the Green, Inc.; Jimmy's Coffee Shop; Jimmy's Family of Fine Restaurants; Jimmy's Too; Peter Pipers; La Cresta Associates; Jimmy's Family Restaurant, a sole proprietorship composed of James Walters and Becky Walters; Jimmy's Family Restaurant, a sole proprietorship composed of James Daglas and Debbie Daglas; Jimmy's Family Restaurant, a sole proprietorship composed of Peter Kaye and Mary Kaye, Snug Harbor Development, Snug Haven Development, Sung Harbor, Snug Haven and/or Kaye and Horning.

III.

SUBSTANTIVE CONSOLIDATION

5. All real and personal property, assets, liabilities and allowable claims against the Kaye Group, James and

Rebecca Walters, James and Debbie Daglas, Demetrius Gatsis and all corporations, partnerships, joint ventures and entities identified in Paragraph 4 above are substantively consolidated into the estate of D.W.G.K. as property of the estate of D.W.G.K. or if allowable as liabilities against the estate of D.W.G.K.

IV.

EQUITABLE SUBORDINATION

6. Any and all allowable pre-petition claims or interests of the Kaye Group, or its insiders, agents or assigns, are subordinated to the claims and interests of all other allowable claimants or interest holders of the estate of D.W.G.K.

V.

TURNOVER

7. By no later than May 15, 1987, the Kaye Group is

ordered to turn over to D.W.G.K. title, possession and control of:

(i) All stock, cash, partnership interests and title to real or personal property and personal property in its possession which is property of the estate of D.W.G.K.; and

(ii) All property, real or personal, in its possession which is described as Units A-1 to A-10; B-1 to B-10; C-1 to C-2; and D-2 in D.W.G.K.'s approved Plan of Reorganization.

8. The Kaye Group is ordered to execute such documents as are necessary to accomplish the orders contained herein.

9. D.W.G.K. is authorized to apply to this Court on an ex parte basis, with notice to the Kaye Group or its counsel of record, for such other and further orders or relief as may be necessary to accomplish the turnover, consolidation or liquidation of estate property as such property becomes known to D.W.G.K.

IT IS SO ORDERED.

DATED: May 15, 1987

HONORABLE JOHN J. HARGROVE
United States Bankruptcy Judge

Respectfully submitted,

WIED & SMELKO
A Professional Corporation

By:_____
WILLIAM A. SMELKO
Attorneys for Debtor/Plaintiff